Supreme Court, U.S.
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80-932

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Do California statutes providing for review of decisions of the California Public Utilities Commission, as presently construed and followed by the California Supreme Court, violate the requirements of Section 1 of the Fourteenth Amendment of the Constitution of the United States.[1]

PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings below. However, because of the nature of the case, as well as the special and limited type of review available in California with respect to decisions and orders of the Public Utilities Commission, appellant believes it would be helpful to inform the Court of the capacity in which each of the parties participated in the proceedings below.

Appellant herein was the respondent in the proceeding before the Public Utilities Commission of the State of California and the petitioner in the proceeding in the Supreme Court of the State of California. The California Public Utilities Commission was the designated respondent in the proceeding in the California Supreme Court. The City of Salinas was the applicant in the proceeding before the California Public Utilities Commission and participated in the proceeding in the California Supreme Court as the real party in interest and, as such, sought denial of the Petition for Writ of Review.

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[1]It is submitted that the question of whether denial of appellant's Petition for Writ of Review by the California Supreme Court in this case, without opinion or a hearing, contravened such requirements, is implicitly and fairly included within the statement of the question presented.

Appellant's parent Company is Southern Pacific Company. Partially owned subsidiaries and affiliates of the appellant, Southern Pacific Transportation Company, are St. Louis Southwestern Ry. Co., The Ogden Union Railway & Depot Co., Portland Traction Company, Portland Terminal Railroad Co., Sunset Railway Company, Central California Traction Company and Trailer Train Company. Wholly and partially-owned subsidiaries and affiliates of St. Louis Southwestern Ry. Co. are the Alton & Southern Ry. Co., Arkansas & Memphis Ry. Bridge & Terminal Co., Dallas Terminal Ry. & Union Depot Co., St. Louis Southwestern Ry. Co. of Texas, Southern Illinois & Missouri Bridge Co., Southwestern Transportation Co., Terminal R.R. Association of St. Louis, Glascar Inc., Main Street Warehouse Company, The Southwestern Town Lot Corp. and Trailer Train Company.

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THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

Appellant, Southern Pacific Transportation Company, appeals from an order of the Supreme Court of the State of California which denied, without hearing or opinion, a Petition for Writ of Review requesting it to determine the lawfulness of certain decisions of the Public Utilities Commission of the State of California. (Appendix A, p.A-1, *infra.*) Appellant submits its Jurisdictional Statement and respectfully requests that probable jurisdiction be noted.

OPINIONS BELOW

On March 18, 1980, the California Public Utilities Commission issued its Decision No. 91469, in *Application of the City of Salinas*, Application No. 59126. (Appendix B, pp.B-1-B-19, *infra.*) On June 3, 1980, the Public Utilities Commission issued its Decision No. 91891 denying an application for rehearing which had been timely filed by appellant. (Appendix C, pp.C-1-C-3, *infra.*) Decisions Nos. 91469 and 91891 of the California Public Utilities Commission have not been reported in the official printed reports of the Commission at this time. The official printed reports of the Public Utilities Commission are presently being issued approximately three to four years after the issuance of the decisions reported therein. In addition, not all decisions of the Commission are reported in full in its official reports, although all decisions are cited therein and at least a summary description of the Commission's Order is provided. It is not known whether or not the Commission's decisions involved in this proceeding will be reported in full by the Commission.

On September 10, 1980, the California Supreme Court entered an order denying the Petition for Writ of Review, which was timely filed by the appellant herein, without hearing or opinion. (Appendix A, p.A-1, *infra.*) That Order is reported in the advance sheets for 27 Cal.3d (Cal. Official Reports No. 27, October 3, 1980, Minutes, p.1).

JURISDICTION

The genesis of this proceeding was the filing of an application by the City of Salinas requesting an order of the Public Utilities Commission of the State of California,

pursuant to Sections 1201-1205 of the Public Utilities Code, authorizing the City to cross appellant's railroad yard with a new highway grade separation and dividing the cost thereof between the City and the appellant. On March 18, 1980, the Public Utilities Commission issued its Decision No. 91469 authorizing the new grade separation and dividing the cost thereof. (Appendix B, pp. B-1-B-19, *infra.*) The railroad, the appellant herein, filed a timely application for rehearing with the Public Utilities Commission which was denied by the Commission in its Decision No. 91891, dated June 3, 1980. (Appendix C, pp.C-1-C-3, *infra.*)[2]

On July 2, 1980, appellant timely filed a Petition for Writ of Review in the Supreme Court of California. In its Petition for Writ of Review, in addition to questioning the lawfulness of the Commission's order in several respects, appellant specifically contended that the California statutes with respect to appeal or review of decisions of

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[2]Decision No. 91891 also modified the Commission's original decision, without hearing or awarding compensation, by adding an order retroactively granting the City a right of entry upon the property of the railroad for purposes of construction of the separation. However, in its answer filed in the California Supreme Court, the Commission conceded that the portion of Decision No. 91891 discussing and modifying the previous Commission decision constituted a new and original order by the Commission and was, therefore, properly the subject of a second timely filed application for rehearing with respect to the retroactive modification. This application for rehearing has also now been denied by the Commission and a Petition for Writ of Review with respect to the portions of Decision No. 91891 discussing and ordering a retroactive modification of its previous decision was timely filed in the Supreme Court of the State of California on November 6, 1980 and is presently pending therein.

the California Public Utilities Commission, as presently interpreted and followed by the Supreme Court of California, contravene the requirements of Section 1 of the Fourteenth Amendment of the Constitution of the United States and, therefore, that the Petition for Writ of Review could not properly be denied without opinion or explanation.[3]

The Petition for Writ of Review was denied, without hearing or opinion, by the Supreme Court of California on September 10, 1980. (Appendix A, p.A-1, *infra.*) On November 21, 1980, appellant filed its Notice of Appeal to this Court in the Supreme Court of California (Appendix D, pp.D-1-D-3, *infra.*) This Court has jurisdiction to hear the appeal under 28 U.S.C. § 1257(2).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

There are a number of constitutional and statutory provisions which are relevant to this proceeding. Because of the number and length of the constitutional and statutory provisions which are relevant to this case, all such provisions cited or partially quoted herein are set forth verbatim in Appendix E. (pp. E-1-E-12, *infra*). They are as follows:

> That portion of the Fourteenth Amendment to the United States Constitution which reads, in part:
>
> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or im-

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[3]As will be pointed out (*infra*, p. 16), this was the first time the question could be raised in view of provisions of the California Constitution and statutes.

munities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article III, Section 3.5, of the California Constitution, which prohibits any administrative agency, such as the Public Utilities Commission, from ruling upon the constitutionality or enforceability of statutes.

Article XII of the California Constitution, which is a restatement of former Artcile XII, establishing the Public Utilities Commission and providing, among other things, that the legislature has "plenary power" to confer authority and jurisdiction upon the Commission and to establish the manner and scope of review of Commission action in a court of record.

Section 1201 of the Public Utilities Code which provides that no public highway may be constructed across a railroad without first obtaining the permission of the Public Utilities Commission.

Section 1202 of the California Public Utilities Code which accords to the Commission power to divide the cost of grade separations between the railroad and the public agency involved.

Section 1202.5 of the California Public Utilities Code which prescribes how the cost of grade separations shall be divided by the Commission, pursuant to its power under Section 1202, under variously specifically described factual situations.

Section 1705 of the California Public Utilities Code which provides, in part, that the Commission must include in its decision, separately stated, findings of fact and conclusions of law on "all issues material to the order or decision."

Section 1731 of the California Public Utilities Code which provides, in part, that no cause of action arising out of any order or decision of the Commission shall accrue to a person in any court unless it has filed an application for rehearing with the Commission.

Section 1756 of the California Public Utilities Code which provides, in part, that within thirty days after the Commission denies a rehearing, a party may apply to the California Supreme Court for a writ of review "for the purpose of having the lawfulness of the original order or decision" inquired into and determined.

Section 1757 of the California Public Utilities Code which limits the extent of the permissible review by the California Supreme Court.

Section 1758 of the California Public Utilities Code which establishes the parties that may participate in a review proceeding and the type of judgment that may be rendered by the California Supreme Court in such a proceeding.

Section 1759 of the California Public Utilities Code which pr vides that *only* the California Supreme Court shall have jurisdiction to review, reverse, correct or annul any order or decision of the Commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the Commission in the performance of its official duties.

Section 1760 of the California Public Utilities Code which provides that the California Supreme Court "shall exercise an independent judgment on the law and the facts" to the extent that the validity of any Commission order is challenged on the ground that it violates a person's right under the Constitution of the United States.

STATEMENT OF THE CASE

Article XII, Section 5, of the California Constitution specifies that the legislature shall have "plenary power, unlimited by the other provisions of" the Constitution, to confer powers upon the California Public Utilities Commission and to establish the manner and scope of review of Commission action in a court of record. It is well established that, by reason of this constitutional provision, sections of the California Public Utilities Code giving powers to the Commission and designating the manner and extent of review of Commission decisions, have the same status as if they were part of the Constitution itself and, in fact, prevail over any other provisions of the Constitution in conflict therewith. *Pacific Tel. & Tel. Co. v. Eshleman,* 166 Cal. 640, 658 (1913).

Exercising its plenary power, the California legislature has provided in the California Public Utilities Code that a party who is subject to the Commission's jurisdiction and is dissatisfied with an order or decision thereof, will have no cause of action in any court with respect to the Commission's order or decision unless the party has timely filed an application to the Commission for rehearing. *Public Utilities Code,* § 1731.

The legislature has also provided, in Section 1756 of the Public Utilities Code, that a party who sought rehearing may apply to the Supreme Court for a writ of review, within thirty days after a rehearing has been denied or a decision on rehearing has been issued, for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and deter-

mined. More importantly, in Section 1759 of the Public Utilities Code, the legislature has provided that, except for the possibility of a writ of mandamus from the Supreme Court in a proper case (a fairly rare occurrence), the right to apply for a writ of review established by Section 1756, shall be the *only* method of review available with respect to decisions of the California Public Utilities Commission.

On April 2, 1954, the California Supreme Court issued its decision in *People v. Western Airlines, Inc.*, 42 Cal.2d 621, app. dismissed, 348 U.S. 859. This was an enforcement action by the Commission in the regular courts, based upon a Commission order which had been the subject of a petition for writ of review to the California Supreme Court that was denied without hearing or opinion. While the question arose in a *res judicata* context, the California Supreme Court stated (pp. 630-631):

> "Direct attack is made available by application for writ of review to this court in accordance with the provisions of section 1756 of the Public Utilities Code. We are not herein dealing with a determination of the commission made in the exercise of its judicial power where no direct attack, on constitutional or other grounds, has been made within the time provided by section 1756. However, it seems clear that where those determinations have been appropriately and unsuccessfully challenged, as here, by direct attack and have run the gamut of approval by the highest courts, state and federal, they should have the conclusive effect of res judicata as to the issues involved where they are again brought into question in subsequent proceedings between the same parties. (*Sunshine A.*

Coal Co. v. Adkins, 310 U.S. 381 [60 S.Ct. 907, 84 L.Ed. 1263].)

"Whether the order of the Supreme Court of the United States dismissing the appeal of the defendant 'for want of a substantial federal question' is res judicata in that court on the question of alleged federal control of intrastate rates, is not for this court to decide. It is established, however, that the denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. (*Southern Calif. Edison Co. v. Railroad Com.,* 6 Cal.2d 737, 747 [59 P.2d 808].) This is so even though the order of this court is without opinion. (*Napa Valley Elec. Co. v. Railroad Com.,* 251 U.S. 366 [40 S.Ct. 174, 64 L.Ed. 310].) In the last cited case it was held at pages 372 and 373 that a denial by this court of an application for a writ of review is 'tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the State of California'; that the 'absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company,' and that it was 'a final judicial determination' and 'as effectual as an estoppel as would have been a formal judgment upon issues of fact.' (See, also, *Funeral Dir. Assn. v. Board of Funeral Directors & Embalmers,* 22 Cal.2d 104, 107, 108 [136 P.2d 785]; *Southern Calif. Edison Co. v. Railroad Com.,* supra, 6 Cal.2d 737, 747; *People v. Hadley,* 66 Cal.App. 370, 375 [266 P. 836]; *Southern Pac. Co. v. Van Hoosear,* 72 F.2d 903; *Con-*

solidated Freightways, Inc. v. Railroad Com. (1951), 36 F.Supp. 269, 270; *Adams v. Decoto* (1927), 21 F.2d 221.)"[4]

Commencing with issuance of Volume 50 of its printed reports, issued in approximately June of 1952, the Commission began placing in the forefront of each volume a listing of Commission decisions with respect to which parties had attempted to obtain a hearing in the Supreme Court and a statement as to whether hearing was granted or denied. The Commission has continued its practice of placing such a table in the forefront of each of its bound volumes through and including Volume No. 77, which is the most recently issued bound volume. Volumes 51-77 of the California Public Utilities Commission reports commence with Decision No. 44624, issued on August 8, 1950, and end with Decision No. 83957, issued on January 7, 1975. Thus, Volumes 50-77 of California Public Utilities Commission Reports cover 39,333 decisions of the Commission. From a check of the listings in the forefront of each of the bound volumes, it appears that there were only approximately 353 attempts to institute a proceeding in the California Supreme Court. More importantly, it appears that a hearing was granted in approximately only 45 cases. Thus, only about 12.8 percent of the attempts to obtain a hearing by the California Supreme Court, over approximately a 25 year period, were successful. More-

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[4]For the convenience of the Court, the entire discussion of the California Supreme Court on this point in *People vs. Western Airlines, Inc.*, appearing at pp. 629-632, which appellant believes is the only portion of the decision relevant to this case, is reproduced in its entirety as Appendix F, pp. F-1-F-4, *infra*.

over, 353 attempts to obtain a hearing represents only approximately .009 of the 39,333 decisions issued during the 25 years covered by Volumes 50-77 of the Commission Reports. The 45 hearings granted represent only slightly more than .001 of such decisions.

It is clear that the Commission and others, following the *Western Airlines* decision, considered denials or writs of review to be a determination on the merits as to questions of law involved, not only for purposes of *res judicata*, but also as precedents for purposes of *stare decisis*. Otherwise, there would be no rational reason for the Commission including a list of hearings granted *or denied* by the Supreme Court in the front of each of its bound volumes for over 25 years. That this was, in fact, the position of the Commission, was confirmed in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 899 (1979). In the *Consumers Lobby* case the petitioners were seeking review of a Commission decision in which it had held that it had no authority to award attorneys fees to parties in its proceedings. The Commission, as well as another party, contended that the issue had been previously decided by issuance of California Supreme Court orders denying writs of review with respect to the same question, including denial of a petition by one of the same parties who successfully obtained review in the *Consumers Lobby* case. However, in the *Consumers Lobby* case, the California Supreme Court rejected the Commission's contention and held that (p.905):

> ". . . although a summary denial by this court of a petition for writ of review is a 'decision on the merits'

> for res judicata purposes (*Western Air Lines*), it is not stare decisis."

Moreover, even as to the party who had previously raised the question of law and had its petition for writ of review denied, the Court determined that it would not apply the *res judicata* doctrine to that party in this case (p.902).[5]

The proceeding giving rise to this appeal was commenced with the filing of an application to the California Public Utilities Commission by the City of Salinas in August of 1979. Its application requested issuance of an order authorizing construction of a multi-lane grade separation over the railroad tracks of appellant near the center of the railroad's local yard. As part of the project, a two-lane county road, which crosses the railroad about one-half mile away, is to be closed. Subsequently, hearings were held and briefs filed. On March 18, 1980, the Commission issued its Decision No. 91469, authorizing construction and dividing the costs of the grade separation by requiring the railroad to pay a full 10% of the cost. (Appendix B, pp. B-1-B-19, *infra.*)

Section 1202.5 of the Public Utilities Code sets forth specific standards to be followed by the Commission in apportioning the cost of constructing grade separations authorized by the Commission. In subsection (a) it is pro-

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[5]For the convenience of the Court, the entire portion of the decision in the *Consumers Lobby* case dealing with the effect of a denial of a petition for writ of review, appearing on pp. 899-905, is reproduced as Appendix G, pp. G-1-G-9, *infra.*

vided that if the project will not result in the elimination of a grade crossing, the entire cost will be borne by the party initiating the project. Subsection (b) requires the Commission to apportion 10% of the costs to the railroad where a grade separation "initiated by a public agency will directly result in elimination in one or more existing grade crossings, located at or within a reasonable distance from the point of crossing of the grade separation. . . ." Subsection (c) requires the Commission to do just the opposite and apportion 10% of the cost to the public agency if a project which will eliminate a grade crossing located within a reasonable distance is initiated by the railroad. Subsection (d) covers division of the cost for the alteration or reconstruction for an "existing grade separation for the purpose of increasing the capacity." Subsection (e) provides that "in the event the Commission finds that a particular project does not clearly fall within the provisions of any one of the above categories, the Commission shall make a finding of fact on the relation of the project to each of the categories and in apportioning the costs, it shall assess against the railroad a reasonable percentage, if any, not to exceed 10%.

A major contention of appellant at the hearings before the Public Utilities Commission was that Section 1202.5(e) was applicable to the grade separation project which was the subject of the City's application, not only because there was a serious question as to whether the minor crossing to be closed, located approximately half a mile away, was located within a reasonable distance, but because the project is actually a dual-purpose project, i.e.

the project is intended as much to establish a new arterial highway as it is to eliminate any existing grade crossing. Therefore, appellant contended that the Commission should enter a finding, in accordance with Section 1202.5(e) of the Public Utilities Code, that this particular project does not *clearly* call within the provisions of only one of the preceding categories and that it should also find that the project bore a relationship to both Section 1202.5(a) and Section 1202.5(b). Appellant also contended that, under such circumstances, a reasonable percentage of the cost to be assigned to appellant would be the equivalent of 10% of the cost of constructing a grade separation at the location of the existing grade crossing to be eliminated which, in appellants opinion, could be expected to reduce the railroad's financial contribution to the project by approximately $425,000.

The Commission's Decision No. 91469 did not even discuss the railroad's contention that cost apportionment should be governed by Section 1202.5(e) of the Public Utilities Code, let alone include any findings or conclusions concerning this principal contention of the railroad, even though in the discussion portion of its decision the Commission specifically recognized the dual nature of the project because there are

> ". . . two purposes to be served by the project (1) to provide the final link in a chain of arterials around the perimeter of the City and (2) to eliminate the Boronda Road grade crossing. The City's program essentially joins two projects into a single plan." (Appendix B, p.B-3).

Moreover, while the decision also stated that whether the project is located within a reasonable distance of the existing grade crossing to be closed is a "difficult" question (Appendix B, p.B-7), the Commission still refused to include a finding of fact as to whether or not the project "clearly" fell within only one of the first four categories of Section 1202.5 of the Public Utilities Code.

On April 16, 1980, appellant timely filed and served an application to the Commission for rehearing with respect to Decision No. 91469. In its application for rehearing, appellant railroad set forth several grounds of unlawfulness, including the Commission's failure to enter a finding as to whether the project "clearly" did or did not fall within one of the first four categories of Section 1202.5 of the Public Utilities Code, since this was a material issue in view of the railroads principal contention that cost apportionment must be governed by Section 1202.5(e) of the Public Utilities Code and, therefore, as the California Supreme Court has repeatedly held, a specific finding is required by Section 1705 of the Public Utilities Code.

On June 3, 1980, the Commission, acting in closed executive session, issued its Decision No. 91891 denying appellant's application for rehearing (Appendix, pp. C.1 - C-3, *infra.*) On July 2, 1980 appellant timely filed and served a Petition for Writ of Review in the Supreme Court of the State of California. In its Petition for Writ of Review, appellant set forth several grounds on which it contended that the Commission had not lawfully pursued its authority, including its failure and refusal to either discuss or enter findings of fact concerning the railroad's

principal contention that cost apportionment should be governed by Section 1202.5(e) of the California Public Utilities Code.

In its Petition for Writ of Review in the California Supreme Court, appellant also raised the question, for the first time, of whether the California statutes providing for review of Commission decisions, as interpreted by the California Supreme Court in *Consumers Lobby Against Monopolies v. Public Utilities Commission,* 25 Cal.3d 891 (1979), and as followed by the Supreme Court, were inadequate and contravene the requirements of Section 1 of the Fourteenth Amendment of the Constitution of the United States. That is the question which appellant now seeks to have determined by this Court by means of this appeal. The question could not be raised prior to its inclusion in the Petition for Writ of Review to the California Supreme Court because it was not relevant to any question before the Public Utilities Commission and the Commission could not have ruled upon the question in any event in view of Article III, Section 3.5, of the California Constitution which provides that the Commission has no power to declare a statute unconstitutional. Answers to the Petition for Writ of Review were filed by the Commission and the City of Salinas.[6]

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[6]In its answer in the California Supreme Court, the Commission reversed its position from that taken in the *Consumers Lobby* case and professed to agree that a denial of a Petition for Writ of Review is only a decision on the merits for *res judicata* purposes and not for *stare decisis.* Of course, this gives the Commission much more freedom to reach whatever result it desires in a particular

On September 10, 1980, the Commission entered its Order denying the Petition for Writ of Review, without opinion or hearing. (Appendix A, p. A-1, *infra.*) Thereafter, on November 21, 1980, appellant filed its Notice of Appeal to the Supreme Court of the United States in the Supreme Court of California and served copies of the Notice upon all parties to the proceeding. (Appendix D, pp. D-1-D-3, *infra.*)

REASONS WHY THE QUESTION PRESENTED IS SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION BY THIS COURT

This case involves the important question of whether a court can treat its power to grant writs of review with respect to decisions of an administrative agency, when that is the sole method of review available, as a discretionary matter and decide which cases will be reviewed on an arbitrary and discriminatory basis without contravening the due process requirements of the Fourteenth Amendment of the United States Constitution. Appellant submits that denial of the petition for writ of review in this case was clearly arbitrary and discriminatory and that the position and actions of the California Supreme Court not only violate the due process requirements of the Fourteenth Amendment of the United States Constitution, but are contrary to principles expressed in prior decisions of this Court.

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proceeding since it need no longer treat questions of law involved in Petitions for Writ of Review which are denied without opinion as constituting a precedent to be followed. This is particularly true in view of the rarity with which Petitions for Writ of Review are filed and especially the rarity with which they are granted.

The issue presented by this case if of widespread significance in view of the multiplicity of administrative agencies in this country and the fact that remedies available to parties subject to the jurisdiction of such agencies, in the event that the agency acts in an unlawful manner, are usually severely limited. It is important that this Court clarify the question of what minimum protection must be provided to parties subject to the jurisdiction of administrative agencies in the event those agencies act contrary to law.

I

AVAILABILITY OF AN ADEQUATE OPPORTUNITY FOR REVIEW OF ADMINISTRATIVE AGENCIES IS REQUIRED

This Court has established, at least with respect to decisions of administrative agencies such as the California Public Utilities Commission, that the availability of an adequate opportunity for review is an essential element of due process required by the Fourteenth Amendment of the Constitution of the United States. *Ohio Valley Co. vs. Ben Avon Borough,* 253, U.S. 287, 289, 291 (1919); *Bluefield Co. vs. Public Service Commission,* 262 U.S. 679, 689 (1922). Moreover, even if review is not required to be made available in some instances, this Court has made it clear that where a State has, in fact, provided for review by statute, the power of review authorized by such statute cannot be exercised in a discriminatory manner, with review being arbitrarily granted or denied, without violating federal due process requirements. *National Union vs. Arnold,* 348 U.S. 37(1954). When statutes provide for an

appeal with respect to federal constitutional questions, the proceedings in the appellate court become part of the process of law. *Cole v. Arkansas,* 333 U.S. 196, 201 (1948). In other words, the obligation to observe due process requirements applies to appellate courts as well as to the original tribunal or administrative agency. Also the Court has made it clear that if a railroad's costs are unreasonably increased so as to be in the nature of confiscation, the protection of the 14th Amendment is real and not to be lightly regarded and a review procedure must be available and adequate. *Lehigh Valley R.R. v. Commissioners,* 278 U.S. 24 (1928).

It is submitted that these previous decisions of this Court are inconsistent with the idea that issuance of writs of review, where that is the only remedy available to a party subject to the jurisdiction of an administrative agency, may be treated as discretionary so that review may be denied even where there has been a clear failure of the administrative agency to comply with applicable law. Moreover, the California legislature, by enactment of Section 1760 of the California Public Utilities Code, which provides that the California Supreme Court *shall* exercise its independent judgment on the law and the facts where a Commission decision is challenged on the ground that it violates any right of a petitioner under the Constitution of the United States, demonstrates a clear intent to comply with the holdings of this Court in *Ohio Valley v. Ben Avon Borough, (supra),* and *Bluefield Co. v. Public Service Commission, (supra).* To treat review as being an entirely discretionary matter, regardless of how obviously unlawful the decision of the administrative agency may be, does not

satisfy the minimum requirements of due process which this Court has indicated are required with respect to decisions of administrative agencies.

II

THE CALIFORNIA SUPREME COURT HAS ADOPTED AN INTERPRETATION OF CALIFORNIA STATUTES WHICH MAKE REVIEW OF DECISIONS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION A MATTER OF DISCRETION WHICH CAN BE ARBITRARILY DENIED EVEN IN THE FACE OF A CLEAR FAILURE TO COMPLY WITH APPLICABLE LAWS

More than a quarter of a century ago, the Commission issued its decision in *People v. Western Airlines,* 42 Cal.2d 621 (1954), app. dis. 348 U.S. 859. In that proceeding it stated that denial of a petition for review of an order of the Public Utilities Commission, which is the only method of review available to persons subject to jurisdiction of the Commission, is a decision on the merits both as to the law and the facts presented in the review proceedings, even though the order of the court denying review is without opinion (pp. 630-631). As a result, the Public Uitlities Commission took the position, until issuance of the California Supreme Court's decision in *Consumers Lobby Against Monopolies v. Public Utilities Commission,* 25 Cal.3d 891, in December of 1979, that denial of a petition for writ of review, being allegedly a decision on the merits as to both the law and the facts, constituted a precedent coming within the doctrine of *stare decisis.* This is evidenced not only by the fact that

the Commission has carefully listed all such denials in the forefront of each volume of its published reports for 25 years, but that it so contended in the *Consumers Lobby* case (p. 899).

The Commission's position concerning the effect of a denial of writ of review, prior to issuance of the decision in the *Consumers Lobby* case, was fully justified in view of the cases cited by the California Supreme Court in the *Western Airlines* case. In support of its statement that denial represented a decision on the merits as to both the law and facts, the California Supreme Court cited *Southern California Edison Co. v. Railroad Comm.*, 6 Cal.2d 737 (1936). However, in that case it was stated that a denial without opinion meets federal constitutional requirements as interpreted by this Court because it is a judicial interpretation on the merits. Moreover it was stated that (p. 747):

> "In passing upon the questions thus presented and required to be determined this court must necessarily pass upon the merits as to both the law and the facts presented in the review proceeding. It is 'the primary duty of every court to dispose of cases according to the law and facts' (Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488.)"

Even more importantly, the quote from the *Mast* case is incomplete. The complete sentence in the *Mast, Foos & Co.* case reads (speaking of comity):

> "It recognizes the fact that the primary duty of every court is to dispose of cases; in a word, to decide them right."

It is submitted that this is completely inconsistent with the idea that Section 1756 of the California Public Utilities Code permits denial of petitions for writs of review in a discretionary, capricious and arbitrary manner. Moreover, in the *Western Airlines* case, the California Supreme Court also cited this Court's decision in *Napa Valley Elec. Co. v. Railroad Commission,* 251 U.S. 366 (1920) in support of its decision. In that case, this Court stated (p.372) that denial of a writ of review did not violate any due process rights under the Constitution of the United States because "it was the exercise of the judicial powers of the court." It is submitted that this Court's decision in the *Napa Valley* case is also inconsistent with any contention that Fourteenth Amendment due process requirements are satisfied by treating petitions for writs of review as matters of discretion which can be arbitrarily and capriciously denied or granted.

Although only purporting to clarify its decision in the *Western Airlines* case, it would seem to be reasonably clear that the California Supreme Court's recent decision in *Consumers Lobby Against Monopolies v. Public Utilities Commission,* 25 Cal.3d 891 (1979), actually reinterpreted the California statutes providing for review of decisions of the Public Utilities Commission to hold that it may arbitrarily grant or deny petitions for writ of review as a discretionary matter. If an order of the California Supreme Court denying a petition for writ of review is actually a decision on the merits as to questions of law presented, then there is no reason why such decisions should not be *stare decisis.* Its holding that denials

of petitions for writs of review are not *stare decisis* (p.905) is just another way of saying that it treats the granting of such writs as purely discretionary. Denial of review, simply as a matter of discretion, is not, in fact, a decision on the merits. Moreover, while the California Supreme Court pointed out that there may be procedural reasons for denying review, there were no such procedural defects in this proceeding. Even when there are procedural defects, it should not be any great burden for the California Supreme Court to state if its denial of review is based thereon. Therefore, it is submitted that the *Consumers Lobby* decision is erroneous in light of previous decisions of this Court, such as *Ohio Valley Co. v. Ben Avon Borough* 253, 287, 289, 291 (1919); *Bluefield Co. v. Public Service Commission,* 262 U.S. 679, 689 (1922); *National Union v. Arnold,* 348 U.S. 37 (1954) and *Cole v. Arkansas,* 333 U.S. 196, 201 (1948).

III

REVIEW OF THE RECORD IN THIS APPEAL WILL DEMONSTRATE THAT, IN DENYING APPELLANT'S PETITION FOR WRIT OF REVIEW, THE CALIFORNIA SUPREME COURT ACTED ARBITRARILY AND DEPRIVED APPELLANT OF ITS RIGHTS OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Appellant, a private corporation, is a "person" as that term is used in Section 1 of the Fourteenth Amendment of the Constitution of the United States. *Grosjean v. American Press Co.,* 297 U.S. 233, 244 (1936). As a "per-

son", appellant is entitled to be protected in its due process rights and it contended to both the Commission and the California Supreme Court that the Commission's decision contravened the requirements of due process.

Appellant has complied with the admonition in this Court's Rule 13 that requests to certify the record should not be made as a matter of course prior to action by the Court on the jurisdictional statement. However, if the Court notes probable jurisdiction, appellant will request that the entire record in the Supreme Court of California be certified, consisting of the Petition for Writ of Review and Appendix filed therewith, the Answers of the Public Utilities Commission and the City of Salinas and the Reply of appellant. With the certification of these documents, the Court will have before it all of the formal pleadings and decisions or orders of both the Public Utilities Commission and the Supreme Court. Appellant believes that the Court will readily see therefrom that substantial and important due process questions were raised before both bodies.

Even without the record having been certified to this Court, the items required to be included in the appendix filed herewith, demonstrate that there was at least one substantial and important question which clearly called for review. Despite the rarity with which the California Supreme Court has granted review, it has frequently admonished the Commission, in published decisions, that Section 1705 of the Public Utilities Code, requiring that Commission decisions must contain, "separately stated, findings of fact and conclusions of law by the Commission on *all*

issues material to the order or decision" (emphasis added), must be obeyed. *California Motor Transport Co. v. Public Utilities Commission,* 59 Cal. 2d 270 (1963); *Associated Freight Lines v. Public Utilities Commission,* 59 Cal. 2d 583 (1963); *Pacific Tel. & Tel. Co. v. Public Utilities Commission,* 62 Cal. 2d 634 (1965); *Southern Pacific Co. v. Public Utilities Commission,* 68 Cal. 2d 243 (1968); and *Greyhound Lines, Inc. v. Public Utilities Commission,* 65 Cal. 2d 811 (1967). Those decisions clearly are *stare decisis.* Nevertheless, despite those admonitions, review was not granted in this case even though the Commission clearly failed to include findings on all material issues.

As pointed out in the statement of the case (pp. 13-15, *supra*), a principal contention of appellant before the Commission was that cost apportionment of the grade sepation must be made pursuant to the provisions of Section 1202.5(e) of the Public Utilities Code which applies to projects that do not "clearly" fall in other categories set forth in the statute. Thus, there would seem to be little doubt that whether the project did "clearly" fall into one of the other categories in Section 1202.5 was a "material issue" as to which a separately stated finding of fact was required. Nevertheless, the Commission's decision made no such findings and did not even discuss the contention of the appellant. (Appendix B). Moreover, it would seem to appear from the face of the Commission's decision that it should have entered a finding that the project did not "clearly" fall within one of the other categories of Section 1202.5 of the California Public Utilities Code in view of its own statements that the project is intended to serve "two purposes" and "essentially joins two projects into

a single plan", i.e. the project is both a new route as part of a chain of arterials around the City "following the adopted Freeway Route which was abandoned by" the state, as well as a project to eliminate a grade crossing some distance away (Appendix, pp.B-3, B-5). Moreover, the Commission also specifically stated that the factual question of whether the project is located within a reasonable distance from the existing grade crossing is a "difficult" question (Appendix, p. B-7). These statements by the Commission, in themselves, would seem to be sufficient to establish that the Commission was required to enter a finding that the project did not "clearly" fall in one of the first four subsections of Section 1202.5 of the California Public Utilities Code and that costs, therefore, must be allocated in the manner provided by Section 1202.5(e).

There can be little question what the refusal of the Commission to make a finding of fact considering the applicability of Section 1202.5(e) of the Public Utilities Code contravened due process requirements. In *Northern Pac. Ry. v. Department of Public Works,* 268 U.S. 39, 44-45 (1925), this Court stated of an action by the Public Service Commission of the State of Washington:

> ". . . an order based upon a finding made without evidence, *The Chicago Junction Case,* 264 U.S. 258, 263, or upon a finding made upon evidence which clearly does not support it, *Interstate Commerce Commission v. Union Pacific R.R.,* 222 U.S. 541, 547, is an arbitrary act against which courts award relief. The error under discussion was of this character. It was a denial of due process."

Also, as this Court stated in the *Chicago Junction* case, 264 U.S. 258, 265 (1924):

> ". . . the provision for a hearing implies both the provisions of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action".

See also

Morgan v. United States, 298 U.S. 468, 480-81 (1936);

Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935);

Southern Ry. v. Virginia, 290 U.S. 190, 196-97 (1933);

Chicago R. I. & P. Ry. v. United States, 274 U.S. 29, 33 (1927);

United States, etc. v. Abilene & Southern Ry., 265 U.S. 274, 288 (1924); and

Interstate Commerce Commission v. Louisville & N. R.R., 227 U.S. 88, 91-92 (1913).

As will also be seen from the record, if certified to this Court, appellant believes that the failure of the Commission to make the finding required by Section 1705 of the Public Utilities Code with respect to the applicability of Section 1202.5(e) to this proceeding, resulted in an order requiring it to contribute approximately $400,000 more to this dual purpose project than it would otherwise have to contribute and, as such, will result in a confiscation of the property of the appellant and a denial of due process—and that the same is true of the California Supreme Courts' arbitrary denial of review.

CONCLUSION

Matters decided by the Public Utilities Commission are not generally minor. They usually involve substantial sums. In fact, the $400,000 which appellant believes is involved in this proceeding may well be one of the smaller Commission cases. Certainly, as this Court has held, some review of such decisions of an administrative agency should be available. However, the California Supreme Court has clearly taken the position that review in California is available only at its discretion.

Treating available review as discretionary must necessarily result in arbitrary and discriminatory action by the California Supreme Court. Some parties will be denied review while, subsequently, another party may be granted review and relief under identical circumstances with respect to the same statutory provisions. In fact, that is exactly what happened in the *Consumers Lobby* case. As pointed out in that case (p. 899) (Appendix, p. G-1), the court had previously denied petitions for review at least twice on the same question of law involved in the *Consumers Lobby* case.

It is not contended by the appellant that the California Supreme Court must grant review in every case. Appellant does contend that granting or denying of review should be a meaningful judicial act and on the merits. It further contends that parties to administrative proceedings, such

as those before the California Public Utilities Commission, are entitled to have a petition for writ of review granted when the Commission has clearly failed to comply with statutory requirements. Under the California statutes, as presently interpreted by the California Supreme Court, the Commission could reach a directly opposite result under identical circumstances the next time the question of applicability of Section 1202.5(e) arises, because the denial by the California Supreme Court in this case does not constitute a precedent. On the other hand, the Commission might reach the same result in a future case under identical factual circumstances and the California Supreme Court apparently feels it would be entitled to grant review even though it had denied review to petitioner in this case. Appellant submits that treating petitions for writs of review under all circumstances as discretionary, thereby raising the distinct possibility that one petitioner may be granted review and another denied review, even though the factual circumstances and questions of law are identical, fails the test of fundamental fairness which is the heart and soul of due process.

The instant case affords this Court a timely opportunity to clarify the extent to which review is required with respect to decisions of administrative agencies and reverse the spuriously reasoned decision of the California Supreme Court in *Consumers Lobby Against Monopolies v. Public*

Utilities Commission, 25 Cal.3d 891 (1979). It is submitted that it would be very constructive for this Court to note probable jurisdiction and to reverse the judgment below.

Dated: December 8, 1980.

Respectfully submitted,

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(Appendices Follow)

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Appendix A*

[Filed Sept. 10, 1980]

Order Denying Writ of Review

S.F. No. 24188

In the Supreme Court of the State of California

In Bank

Southern Pacific Transportation Company

v.

Public Utilities Commission, etc., et al.

Petition for writ of review DENIED.

/s/ BIRD
Chief Justice

*Appendix A is required to be included by both section 1(j)(i) and section 1(j)(iii) of the Court's Rule 15.

Appendix B

Decision No. 91469 March 18, 1980
Before the Public Utilities Commission
of the State of California

Application No. 59126
(Filed September 6, 1979)

Application of the City of Salinas for an order authorizing construction of a crossing at separated grades of a crossing at separated grades between Davis Road and the tracks of the Southern Pacific Transportation Company, sometimes referred to as the Davis Road Overhead. PUC No. E-117.23-A.

Raymond M. Haight, City Attorney, for the City of Salinas, applicant.

Harold S. Lentz, Attorney at Law for Southern Pacific Transportation Company, respondent.

Robert W. Stitch, for the Commission staff.

OPINION

The application of the city of Salinas (City) requests an order authorizing construction of a crossing at separated grades between Davis Road and the tracks of the Southern Pacific Transportation Company (SP), sometimes referred to as the Davis Road Overhead (PUC No.

E-117.23-A.), and that the Commission apportion 10 percent of the cost of the Davis Road Overhead project to SP pursuant to the provisions of Section 1202.5(b) of the Public Utilities Code (PU Code):

> "(b) Where a grade separation project initiated by a public agency will directly result in the elimination of one or more existing grade crossings, located at or within a reasonable distance from the point of crossing of the grade separation, the commission shall apportion against the railroad 10 percent of the cost of the project. The remainder of such costs shall be apportioned against the public agency or agencies affected by such grade separation."

As City and SP have not voluntarily executed a written agreement to share the project cost, duly noticed public hearings in the matter were held before Administrative Law Judge Orville I. Wright (ALJ) in San Francisco, California, on February 11, 13, 14, 15, and 19, 1980. At the conclusion of the hearings the matter was submitted subject to the filing of concurrent briefs by the parties, due March 3, 1980.

Decision No. 90399 dated June 5, 1979 established that Boronda Road is Number 22 in priority of railroad crossings which we determined to be most urgently in need of separation or alteration for the year 1979-1980. The Davis Road grade separation (project) is advanced by City as qualifying to replace it. We are to determine here whether the project will directly result in the elimination of the Boronda Road crossing and whether the project is within a reasonable distance from Boronda Road. We are also to determine the merits of several objections to our approval of the project raised by respondent.

The draft environmental report is entitled "Davis Road Extension and Grade Separation", indicating the two purposes to be served by the project: (1) to provide the final link in a chain of arterials around the perimeter of City and (2) to eliminate the Boronda grade crossing. City's program essentially joins two projects into a single plan.

The geometric limits of the Davis Road grade separation (project) for which the City seeks an apportionment of 10 percent of the cost to SP are set forth on pages 5 and 6 of Exhibit 1, and are as follows:

1. The removal and closure to traffic of the existing Boronda Road Grade Crossing, PUC No. E-116.7, and the cul-de-sac and barricades required in connection therewith.

2. The northerly approach roadways, supporting embankments, and appurtenances of the Davis Road Overhead extending to the northerly end of the sag vertical curve at or about Station 113 + 50. For right-of-way costs, the amount shall be determined by prorating the area required south of said Station 113 + 50, as related to the total area to be acquired between the SP's existing northerly right-of-way line and West Rossi Street.

3. Relocation of the Monterey County Flood Control and Water Conservation District Canal.

4. Two bridge structures, one spanning West Market Street and the second spanning the SP tracks and right-of-way.

5. All approach roadways, embankments, and appurtenances, southerly of the Davis Road Overhead structure, extending to Station 96, except that work associated with

Ramps C and D, which do not carry traffic across the railroad, are excluded, as set forth below.

6. For right-of-way cost south of West Market Street, 51 percent of the net cost of the rights-of-way required for the total grade separation project and the several loops and approach roadways between the north line of Via Maria on the south and the existing state-owned right-of-way of Route 183 along West Market Street.

7. Pavement widening along West Market Street, as necessary to provide channelized left turn pockets to Ramps A and B and temporary detours, as needed, to carry traffic through construction.

8. Railroad work, flagging, adjustment of trackage, adjustment to signal and communication lines, and the like, all as may be described in a subsequent Railroad Agreement.

Those portions of the project for which the City does not seek an apportionment of cost to SP are set forth on pages 6 and 7 of Exhibit 1, and are as follows:

9. Traffic signals and roadway lighting along West Market Street.

10. Ramps C and D.

11. Approach roadways and associated rights-of-way northerly of the north end of the sag vertical curve at or about Station 113 + 50.

12. Approach roadways and pro rata portion of rights-of-way southerly of Station 96 + 00, as described in paragraph 2 above.

The total cost of the project is estimated at $7,296,000 of which $490,000 represents extension of the overpass over

the distance of three additional contemplated tracks at the request of SP.

That the project will directly result in the elimination of the Boronda Road crossing is a fact virtually uncontradicted by respondent. The evidence shows that the project would provide a portion of the connector route around the City generally following the adopted Freeway Route which was abandoned by the California Department of Transportation. City, with County of Monterey participation, has constructed 1.2 miles of this route as a 4-lane highway from Route 68 westward to Alisal Street. Monterey County is now constructing an extension of the 4 lanes from Alisal Street westward 0.42 miles to Davis Road. From the U.S. 101 interchange at Laurel Drive, developers have extended Davis Road southerly approximately 0.6 miles. The project will connect this southerly extension of Davis Road with that portion of Davis Road which lies south of Market Street. (Exhibit 11, pages 2-4; also see TR 43:16 to 44:30; 16:12 to 17:3; 114:22 to 115:1.)

Construction of the project will greatly improve convenience to the motoring public by providing a much more direct north-south travel corridor in the western part of City. It will provide a quicker, safer route for the vast majority of the motoring public which presently uses Boronda Road. It will save a great deal of travel time for residents in the southwest portion of the City who wish to travel to the northern part of City, particularly to the regional shopping center or to U.S. 101 (TR 28:12-25; also see TR 30:12-30; 228:27 to 229:1). The converse is also true, to wit: construction of the project will substantially benefit those individuals in the northwestern part

of City who wish to travel to the southern part of town or beyond to such areas as Fort Ord (TR 168:10-20).

The record further reveals that the project will provide a more direct and convenient north-south corridor for the motoring public living in or traveling through the western portion of City, as opposed to the present corridor located at Boronda Road, a significant savings in travel time and fuel cost would be effected. The project ". . . is a much more direct route, cutting down the distance they'd have to travel. It furnishes a much faster route. It saves them a lot of time, as well as mileage on their cars." (TR 28: 22-25). ". . . with the shorter travel distance, there is savings to the public in terms of less travel distance, less fuel consumption, less pollution to the environment due to vehicles traveling out of their way, wasting fuel at grade crossings or going into them." (TR 229:9-14).

We believe that the record amply demonstrates that the project will provide a far more convenient traffic corridor over the SP tracks than does Boronda Road and will directly result in the closing of the latter crossing.

SP appears not to seriously contend otherwise. It, however, alleges that because the Boronda Road crossing is in Monterey County (County) outside the limits of City, the Commission is precluded from ordering its closure because County is not a party to this proceeding. No authority is cited for this argument by SP.

SP confuses appearance at the hearing with notice thereof and an opportunity to be heard. County received

notice of OII 32 wherein Boronda Road was given a ranking of Number 22 on the priority list. County has nominated City as lead agency for project purposes and for purposes of the environmental impact report filed in this proceeding. In these circumstances, the Commission's exclusive power to alter, relocate, or abolish by physical closing any crossing heretofore established is abundantly clear.

SP argues that too high priority was given to Boronda Road in Decision No. 90399. But that proceeding was concluded on June 5, 1979 without petition for rehearing having thereafter been filed by SP. The time is long past for relitigation of OII 32.

A more difficult question is whether the project is within a reasonable distance from the point of crossing at Boronda Road.

SP witnesses testified that cost is one measure of the reasonableness of an overpass to be located at a point other than at the point of crossing to be eliminated. City's expert witness submitted a feasible overpass plan for Boronda Road which he estimated to cost $4,852,000 as compared with the $7,296,000 cost estimate for the project. There appears not to have been any case in the records where an overpass located apart from the grade crossing itself costs more than construction at the crossing itself.

We agree, along with the witnesses of SP and of City, that other factors than cost alone must be taken into account by the Commission in cases such as this one. These factors include public safety, traffic service, existing development in the area, established land use patterns and

plans, and facility and time of response by emergency vehicles.

The evidence shows that, when constructed, the project will directly connect State Route 183 with U.S. 101 on the westerly side of the City, eliminating the necessity for vehicles to travel into the heavily congested downtown area to accomplish the same linkup. (Exhibit 11, page 3.)

The project will improve access to nearby neighborhoods. It is at a location where it offers a substantial benefit to large segments of the community on each side of the project (TR 30:12-30; 228:27 to 229:1; 339:3 to 400:11).

The project would greatly improve the access of emergency vehicles (fire, police and ambulance vehicles) to areas adjacent to or near the project area, and would significantly enhance their emergency response time (TR 29: 25 to 30:11), by as much as 1 minute, in that it would alleviate the present situation which entails an adverse travel distance of as much as ½ mile for many emergency trips (TR 271:10-19). There is evidence that the City is planning to construct a new fire station in the Rossi-Rico area which would serve neighboring areas north and south of West Market Street and ". . . this is not really possible without having both the grade separation as well as one that is located close enough to make the running time for a fire engine at a minimum" (TR 29:21-24).

The Davis Road alignment is consistent with City's Rossi-Rico Land Use Plan, which shows Boronda Road as terminating just prior to and on the north side of the SP tracks, and the project being built on the Davis Road alignment. (Exhibit 5; TR 31:26 to 32:2.)

The Davis Road alignment is the logical and appropriate location for the project, for the additional reason that substantial development of the Rossi-Rico area is planned in the immediate future. Exhibit 11, page 3, discloses the following planned development:

> "The construction of approximately 1,000 single family homes and 600 apartments has been approved, and some are now complete. The United States Postal Service has purchased land in the area and is building a regional distribution center. The Salinas Elementary School District has completed a half million dollar extension of the elementary school which will serve the area. Without the construction of the proposed overpass, the projected growth indicated for the area will certainly suffer from inadequate traffic circulation. An Improvement District is being formed as a separate project to improve the internal circulation within the area."

It is expected that substantial growth will take place in the Rossi-Rico area (TR 131:23-27):

> ". . . because that has the public facilities already there, is already annexed, and has a project that's been approved, and is being designed for the portion of Davis Road north of Rossi Street, and also Rossi Street out to Main."

A portion of North Davis Road has already been constructed, with an interim connection to Laurel Drive; a portion has already been constructed to a 4-lane divided highway, with a 106-foot right-of-way (TR 178:8-16). A portion of Rossi Street extending out to Main Street has already been approved by the City Council; an assessment district has been formed to pay for portions of the Davis

Road and Rossi Street extensions (TR 178:17-26). All of this has been done in anticipation of the Davis Road Overhead project (TR 178:27 to 179:8). The City has also expended approximately $200,000 (about ½ of which is project eligible) for purchasing rights-of-way in the area for the purpose of improving Davis Road and Rossi Street (TR 179:9-26). Other developments have taken place as set forth in Exhibit 11, page 2.

The investment in the aforereferenced public improvements that have been constructed or planned would be substantially and adversely affected if the project were not built on the Davis Road alignment. City argues that any other alignment, giving consideration to all the surrounding circumstances, would not only be wasteful, but illogical and inappropriate as well.

City has approved the Davis Road alignment (TR 31:30 to 32:6; 253:5-8). County has approved the Davis Road alignment (TR 35:1-25; 253:17-21) and has entered into an agreement with City whereby the latter is to act as lead agency with respect to preparation of studies and the filing of applications with the Public Utilities Commission. In addition, County has budgeted $150,000 toward the engineering costs of the project for this fiscal year and has also shared in ½ of the cost of the preliminary analysis of the project (TR 35:1-22; Exhibit 11, page 1). An agreement between the City and the County relating to sharing in the cost of construction of the project is presently being prepared and will probably be executed within a short period of time (TR 35:23-25).

City's expert witness testified to the validity of design criteria for a hypothetical feasible overpass at Boronda Road at less cost than that for the project. He testified that, while the overpass would be adequate, the route of vehicular traffic which would result would be "lousy". (TR 271:3)

City's testimony is that there would be adverse environmental effects from the hypothetical configuration because all of the alignment south of the SP tracks goes through agricultural property, and on the north side of the SP tracks it goes through an area susceptible to flooding. It also interferes with the Rossi-Rico Land Use Plan which calls for open space in the area. It would require adverse travel distance for the motoring public. Specifically, it would generate approximately 3,321 vehicle miles per day of adverse travel (based on a level of 10,000 vehicles per day). This, in turn, would result in a fuel waste amounting to $565 per day, or slightly more than $200,000 per year. Approximately 67,342 gallons of gas would be wasted per year. By 1995, based on a level of 33,000 vehicles per day, this would amount to approximately 250,000 gallons of wasted fuel per year as compared to the Davis Road Overhead alignment. (TR 269:9 to 270:23; 179:27 to 182:18; TR 316:26-29.)

All off the aforesaid facts, taken together, persuade us that the project is in reasonable proximity to the grade separation to be eliminated and that it is in the public interest that the project be approved even though its cost, standing alone, is substantially in excess of the feasible hypothetical configuration at Boronda Road. The distance

between the two points is 2,300 feet which we find to be reasonable.

The motion of SP to bring County into this proceeding was properly denied by the ALJ.

No other issues require discussion.

Findings of Fact

1. Public convenience and necessity require that the City be authorized to construct a crossing at separated grades along the alignment of Davis Road, spanning the tracks of SP between Rossi Street and south of West Market Street, as more particularly described in the application and attached exhibits, for both motorized and nonmotorized traffic, to be identified as Crossing E-117.2-A.

2. City is the lead agency for this project and is acting on behalf of itself and County.

3. Project follows an alignment which is consistent with City's Rossi-Rico Land Use Plan, which calls for the southerly terminus of Boronda Road (which basically follows a north-south direction) to be located at a point on the north side of the SP tracks, and for the closure of the Boronda Road grade crossing.

4. Project offers superior service and function to the motoring public and emergency vehicles than the Boronda Road grade crossing.

5. Project will result in the saving of substantial amounts of motor vehicle fuel and overall travel distance for the motoring public as compared to the Boronda Road grade crossing and the adverse travel distance it requires.

6. Project will serve the same traffic corridor as the Boronda Road grade crossing.

7. Project provides a convenient and logical north-south traffic corridor, as compared to the Boronda Road grade crossing.

8. Project will provide superior access to the Rossi-Rico area of the City of Salinas, as well as to other surrounding neighborhoods, as compared to the Boronda Road grade crossing.

9. The Rossi-Rico area is planned for substantial residential and commercial growth and a substantial investment in development planning and in public and private improvements has already occurred in this area.

10. Project will substantially enhance the safety of the motoring public in crossing over the SP tracks by enabling it to do so at a separated grade, thereby avoiding the potential of vehicle-train accidents which exists at the Boronda Road grade crossing.

11. Project will substantially aid in reducing traffic congestion on West Market Street and at the Main Street Underpass (which is located approximately 1.3 miles to the east of the proposed grade separation structure).

12. Project will directly result in the elimination of the Boronda Road grade crossing, PUC No. E-116.7, which is located approximately 2,300 feet westerly of the point of crossing of the proposed grade separation structure.

13. The Boronda Road grade crossing is located within a reasonable distance of the point of crossing of the proposed grade separation structure.

14. Project falls within the classification contemplated by Section 1202.5(b) of the Public Utilities Code.

15. Project will benefit SP in that it will enable it to avoid the potential vehicle-train conflict that exists at the Boronda Road grade crossing, and will enable it to utilize the area more effectively for train switching movements.

16. SP has four existing tracks in place at the site of the proposed grade separation structure, and has requested that the bridge structure that will cross over its tracks be of sufficient length to accommodate the installation of three additional tracks in the future. Applicant is willing to provide the space for the three future tracks and such space should be provided. This will also benefit SP.

17. A feasible hypothetical grade separation project located on an alignment at or immediately adjacent to Boronda Road has been reviewed. While engineering details of these various alternatives were not fully developed, it is evident that any grade separation alignment along or adjacent to Boronda Road would be substantially inferior to the Davis Road alignment from the standpoint of public convenience and necessity.

18. An alignment along or adjacent to Boronda Road would not only offer inferior service and function to the motoring public, but to emergency vehicles as well.

19. An alignment along or adjacent to Boronda Road would be inconsistent with the Rossi-Rico Land Use Plan of City.

20. An alignment along or adjacent to Boronda Road would result in a substantial waste of motor vehicle fuel

and adverse travel distance to the motoring public, as compared to the Davis Road alignment.

21. The project has been placed on the 1979-80 annual priority list established by the Commission pursuant to the provisions of Section 2452 of the Streets and Highways Code.

22. The project is in Priority Position Number 22 as set forth in PUC Decision No. 90399, dated June 5, 1979.

23. Pursuant to PUC Decision No. 90399, the Boronda Road grade crossing has been found to be urgently in need of elimination or separation.

24. SP was represented in the nomination hearings which were held in 1979 and which culminated in PUC Decision No. 90399. SP did not object to the nomination of the project by City, and SP did not request that the hearings be reopened or that a rehearing be set with respect to this project.

25. On January 28, 1980, City, acting as lead agency for this project, approved a Final Environmental Impact Report with respect to the project. Applicant filed a Notice of Determination in accordance with the California Environmental Quality Act. This notice and the Final Environmental Impact Report have been filed with the Commission.

26. The Commission has considered Applicant's Final Environmental Impact Report and finds that the benefits of the proposed project outweigh any adverse effects, and that the proposed project should be approved.

27. Inasmuch as this project falls under Section 1202.5 (b) of the Public Utilities Code, 10 percent of the cost of

construction should be apportioned against the railroad. The remainder of the construction costs should be borne by City. The project cost should be defined as the cost of that portion of the project described as follows:

a. The removal and closure of the existing Boronda Road Grade Crossing, PUC No. E-116.7, and the cul-de-sac and barricades required in connection therewith.

b. The northerly approach roadways, supporting embankments, and appurtenances of the Davis Road Overhead extending to the northerly end of the sag vertical curve at or about Station 113 + 50. For right-of-way costs, the amount shall be determined by prorating the area required south of said Station 113 + 50, as related to the total area to be acquired between the SP's existing northerly right-of-way line and West Rossi Street.

c. Relocation of the Monterey County Flood Control and Water Conservation District Canal.

d. The two bridge structures, one spanning West Market Street and the second spanning the SP tracks and right-of-way.

e. All approach roadways, embankments, and appurtenances, southerly of the Davis Road Overhead structure, extending to Station 96, except that work associated with Ramps C and D, which do not carry traffic across the railroad, shall be excluded.

f. For right-of-way cost south of West Market Street, 51 percent of the net cost of the rights-of-way required for the total grade separation project and the

several loops and approach roadways between the north line of Via Maria on the south and the existing state-owned right-of-way of Route 183 along West Market Street.

g. Pavement widening along West Market Street, as necessary to provide channelized left turn pockets to Ramps A and B and temporary detours, as needed to carry traffic through construction.

h. Railroad work, flagging, adjustment of trackage, adjustment to signal and communication lines, and the like, all as may be described in a subsequent Railroad Agreement.

28. Maintenance cost of the elevated structure, including abutments, piers, superstructure, and approach embankments, should be borne by City. SP should be responsible for the cost of maintenance of railroad track, longitudinal drainage, and all railroad facilities.

29. Following completion and opening to traffic of the Davis Road Overhead, the existing Boronda Road grade crossing, PUC No. E-116.7, should be abandoned and physically barricaded to public traffic.

30. Clearances should be in accordance with General Order 26-D. Walkways should conform to General Order 118.

31. Construction plans of the proposed project should be submitted by City to SP for its technical review and should be filed with the Commission prior to commencing construction.

32. Changes incorporated into the project which mitigate the significant impacts are the responsibility of City. Such changes should be adopted by City.

Conclusions of Law

1. The proposed project falls within the classification established by Section 1202.5(b) of the Public Utilities Code.

2. The application for an Order to Construct the project and the request for an apportionment of ten percent (10%) of the cost thereof to SP should be granted.

3. In view of the need of the city of Salinas to obtain an order immediately in order to receive an allocation of funds from the Grade Separation Fund Program this fiscal year, this order will be effective immediately.

ORDER

IT IS ORDERED that:

1. The city of Salinas is authorized to construct the Davis Road Overhead (PUC E-117.2-A) at separated grades across the tracks of the Southern Pacific Transportation Company, all as set forth in the findings of this decision.

2. Ten percent of the cost of the project, as defined in the findings, shall be apportioned against the Southern Pacific Transportation Company, and the remainder thereof shall be borne by the city of Salinas.

3. Within thirty days after completion of construction pursuant to this order, the city of Salinas shall so advise the Commission in writing.

4. This authorization shall expire if not exercised within three years unless time be extended or if the above conditions are not complied with. Authorization may be revoked or modified if public convenience, necessity, or safety so require.

The effective date of this order is the date hereof.

Dated March 18, 1980, at San Francisco, California.

JOHN E. BRYSON
President

VERNON L. STURGEON
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
Commissioners

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.

Appendix C

Decision No. 91891, June 3, 1980

Before the Public Utilities Commission
of the State of California

Application No. 59126
(Filed September 6, 1979)

Application of the City of Salinas for an order authorizing construction of a crossing at separated grades between Davis Road and the tracks of the Southern Pacific Transportation Company, sometimes referred to as the Davis Road Overhead, PUC No. E-117, 23-A.

ORDER DENYING REHEARING AND MODIFYING DECISION NO. 91469

The Southern Pacific Transportation Company (SP) has filed a petition for rehearing of Decision No. 91469, issued March 18, 1980. The Commission has considered each and every allegation raised therein, and is of the opinion that sufficient grounds for rehearing have not been shown. Rehearing will therefore be denied.

In addition, the City of Salinas (City) has filed a petition for modification of Decision No. 91469 in several particulars, pursuant to Rule 43 of the Commission's Rules of Practice and Procedure. The modifications sought by the City would explicitly grant it the authority to enter upon SP's right of way to effectuate construction.

We have carefully considered the arguments of both parties on this issue, and have come to the conclusion that Decision No. 91469, issued pursuant to our exclusive authority over grade separation projects, should be modified. This decision has authorized construction of the Davis Road Overhead. Inherent in this authorization, we believe, is authorization to the City to enter onto so much of SP's right of way as it must to carry out the construction we have authorized. This authorization became effective the same date as the order authorizing construction, i.e., March 18, 1980. We are of the opinion that this authorization to enter is not only a necessary and logical concomitant of an order authorizing construction, but is supported by legislative enactment as well. Public Utilities Code Section 1204, which discusses grade separation projects, states in pertinent part:

> ". . . The Commission may provide that the physical work of making the grade separation as well as the proceedings for letting contracts therefor, collecting and enforcing the assessments, and making payment for damages and for the acquisition of property shall be done through the agency of the political subdivision in accordance with law. The order of the commission shall authorize the officers of the political subdivision to *enter upon so much of the right of way* of the railroad, interurban railroad, or street railroad as is necessary to effect the physical grade separation." (Emphasis added.)

We do not consider Section 1202.1 to be applicable to the facts of the instant case, despite SP's contrary argument.

A caveat is in order, however. While we view our order authorizing construction of this grade separation project

to contain by implication the authority for the City to enter SP's right of way, this authorization is in the nature of a license. It is not intended to convey any property right to the City, and does not eliminate the necessity for the City to obtain any necessary easements through appropriate eminent domain proceedings.

Despite our view that this authorization pursuant to Section 1204 is inherent in Decision No. 91469, to avoid any confusion on this point, will will modify that decision to explicitly recognize the operation of that statute.

IT IS THEREFORE ORDERED that rehearing of Decision No. 91469 is hereby denied.

IT IS FURTHER ORDERED that Decision No. 91469 is modified by adding the following paragraph:

> Pursuant to Public Utilities Code Section 1204, the City of Salinas is authorized to enter upon so much of the right of way of SP as is necessary to effect the physical grade separation.

The effective date of this order is the date hereof.

Dated June 3, 1980, at San Francisco, California.

John E. Bryson
President

Vernon L. Sturgeon
Richard D. Gravelle
Leonard M. Grimes, Jr.

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.

Appendix D

S. F. No. 24188

In the Supreme Court
of the
State of California

Southern Pacific Transportation Company, a corporation,
Petitioner,

vs.

The Public Utilities Commission of The State of California,
Respondent,

City of Salinas,
Real Party in Interest.

[Filed Nov. 21, 1980]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Southern Pacific Transportation Company, the Petitioner above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California entered in this action on September 10, 1980, denying the petition for writ of review with respect to decisions of the Public Utilities Commission of the State of California.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: November 21, 1980.

Harold S. Lentz
Southern Pacific Building
One Market Plaza
San Francisco, CA 94102
Attorney for Southern
Pacific Transportation
Company.

AFFIDAVIT OF SERVICE BY MAIL

State of California
City and County of San Francisco

The undersigned being duly sworn, deposes and says:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years, a citizen of the United States and not a party to the within entitled action. My business address is Southern Pacific Building, One Market Plaza, San Francisco, California 94105. On November 21, 1980, I served the attached Notice of Appeal to the Supreme Court of the United States on the attorneys of record for the Respondent and the Real Party in Interest in this action, by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Janice E. Kerr
Hector Anninos
Anne K. Mester
Alvin S. Pak
Attorneys for the Public Utilities
Commission for the State of California
5066 State Building, San Francisco, CA 94102

Raymond M. Haight
City Attorney for the City of Salinas
200 Lincoln Avenue
Salinas, CA 93901

James M. Del Bene

Subscribed and sworn to
before me this 21st day
of November 1980

Catherine B. Lundy (Notarial Stamp)
Notary Public—California
Principal Place of Business in
City and County of San Francisco
My Commission Expires October 8, 1983

Appendix E

Miscellaneous Provisions of the Constitutions of the United States and the State of California and the Public Utilities Code of the State of California

Amendment XIV of the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III of the California Constitution:

§ 3.5. [Limitation on powers of administrative agencies]

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless

an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Article XII of the California Constitution (as restated):

§ 1. [Public Utilities Commission—Membership and terms —Vacancies—Removal]

The Public Utilities Commission consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. A vacancy is filled for the remainder of the term. The Legislature may remove a member for incompetence, neglect of duty, or corruption, two thirds of the membership of each house concurring.

* * * *

§ 3. [Utilities subject to legislative control]

Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.

§ 4. [Rate-fixing—Discrimination—Judicial review]

The commission may fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or dis-

criminatory charges. A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified, and this decision shall not be subject to judicial review except as to whether confiscation of property will result.

§ 5. [Legislative power]

The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

* * * *

§ 9. [Construction of Article]

The provisions of this article restate all related provisions of the Constitution in effect immediately prior to the effective date of this amendment and make no substantive change.

Public Utilities Code of the State of California:

§ 1201. Construction of roads or tracks across railroad tracks: Authority to grant or refuse permission

No public road, highway, or street shall be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway, or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corpora-

tion at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without having first secured the permission of the commission. This section shall not apply to the replacement of lawfully existing tracks. The commission may refuse its permission or grant it upon such terms and conditions as it prescribes.

§ 1202. Exclusive powers of commission

The commission has the exclusive power:

(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by railroad or vice versa.

(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the state, county, city, or other political subdivision affected.

* * * *

§ 1202.5. Standards governing commission in prescribing proportions in which expense of construction, etc., to be divided between railroad corporations and public agencies

In prescribing the proportions in which the expense of construction, reconstruction, alteration, or relocation of grade separations shall be divided between railroad or street railroad corporations and public agencies, in proceedings under Section 1202, the commission, unless otherwise provided in this section, shall be governed by the following standards:

(a) Where a grade separation project, whether initiated by a public agency or a railroad, will not result in the elimination of an existing grade crossing, located at or within a reasonable distance from the point of crossing of the grade separation, the commission shall require the public agency or railroad applying for authorization to construct such grade separation to pay the entire cost.

(b) Where a grade separation project initiated by a public agency will directly result in the elimination of one or more existing grade crossings, located at or within a reasonable distance from the point of crossing of the grade separation, the commission shall apportion against the railroad 10 percent of the cost of the project. The remainder of such costs shall be apportioned against the public agency or agencies affected by such grade separation.

(c) Where a grade separation project initiated by a railroad will directly result in the elimination of an existing grade crossing, located at or within a reasonable distance from the point of crossing of the grade seperation,

the commission shall apportion 10 percent of the cost, attributable to the presence of the highway facilities, against the public agency or agencies affected by the project, and the remainder thereof to the railroad or railroads applying for authorization to construct such grade separation.

(d) Where the project consists of an alteration or reconstruction of an existing grade separation for the purpose of increasing the capacity of the structure for highway purposes, the commission shall apportion 10 percent of the cost against the railroad and the balance against the public agency or agencies affected by such grade separation.

Where the project consists of an alteration or reconstruction of an existing grade separation for the purpose of increasing the capacity of the structure for railway purposes, the commission shall apportion 10 percent of the cost against the public agency or agencies affected and the balance against the railroad applying for authorization to alter or reconstruct such grade separation.

(e) In the event the commission finds that a particular project does not clearly fall within the provisions of any one of the above categories, the commission shall make a specific finding of fact on the relation of the project to each of the categories, and in apportioning the costs, it shall assess against the railroad a reasonable percentage, if any, of the cost not exceeding the percentage specified in subsection (b), dependent on the findings of the commission with respect to the relation of the project to each category. The remainder of such cost shall be apportioned

against the public agency or agencies affected by the project.

(f) In the event the commission finds that the respective shares of any apportionment should be divided between two or more railroads or two or more public agencies, the commission, to the extent that it has jurisdiction to do so in a particular proceeding before it, shall divide the shares between the railroads or the public agencies, or both, on any reasonable basis, to be decided by the commission, but in so doing shall follow the standards hereinabove prescribed for apportionment between railroads and public agencies, respectively.

(g) The standards herein prescribed for apportionment of costs of grade separations shall not be applicable where federal funds are used. On such projects, the apportionments shall be in accordance with federal law and the rules, regulations, and orders of the federal agency administering such law, where applicable.

(h) No provision of this section or of the Public Utilities Code shall be construed as in any way limiting the right of public agencies or railroads to negotiate agreements apportioning costs of grade separations, and the validity of any and all such agreements is hereby recognized for all purposes regardless whether the method of apportionment prescribed therein conforms to the standards hereinabove prescribed.

As used in this section "public agency" includes a separation of grade district, as well as the state, a county, city, or other political subdivision.

§ 1705. Hearings: Subpoenas: Order: Effect of decisions rendered in response to complaints against utilities involving small sums of money

At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. Except for decisions filed after hearings held under Section 1702.1, the decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof except as otherwise provided by the commission, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order. Decisions rendered in response to complaints filed and processed pursuant to Section 1702.1 shall not be consid-

ered as precedent or binding on the commission or the courts of this state.

* * * *

§ 1731. Application for rehearing: Accrual of cause of action arising out of order or decision

After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed application to the commission for a rehearing before the effective date of the order or decision, or, if the commission fixes a date earlier than the 20th day after issuance as the effective date of the order or decision, unless the corporation or person has filed such application for rehearing before the 30th day after the date of issuance, or before the 10th day after the date of issuance in the case of an order issued pursuant to Article 5 (commencing with Section 816) and Article 6 (commencing with Section 851) of Chapter 4 of this division relating to security transactions and the transfer or encumbrance of utility property.

* * * *

§ 1756. Time for application for review to Supreme Court: Return of writ: Certification of record

Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified.

§ 1757. Introduction of new evidence: Limit of review: Finality of findings and conclusions

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.

The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

§ 1758. Parties authorized to appear: Entry of judgment: Applicable procedure provisions

The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article.

§ 1759. Jurisdiction of courts to review orders or decisions of commission

No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

§ 1760. When Supreme Court to exercise independent judgment on law and facts

In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or

conclusions of the commission material to the determination of the constitutional question shall not be final.

Appendix F

Portion of the Opinion of the California Supreme Court in People v. Western Air Lines, Inc., 42 C.2d 621 (1954), appearing at pages 629-632

"At the outset it is urged by the plaintiff that the prior decision of the commission followed by the order of this court denying a writ of review and the dismissal of the defendant's appeal by the Supreme Court of the United States has resulted in res judicata as to certain issues involved in the present action. These include the determination (1) that the commission had jurisdiction to fix the intrastate fares of the defendant; (2) that the status of the defendant is that of a public utility subject to regulation as contemplated by [629] the Constitution of this state; and (3) that the Civil Aeronautics Act of 1938, as amended, has not deprived this state of the power, through the commission, to regulate the defendant's intrastate fares.

"The determination as to these three questions was made, the plaintiff asserts, in the exercise by the commission of its judicial power, and was and is to that extent as conclusive as would be a final judgment of a court of record.

"Under the Constitution and statutes of this state the commission is possessed of broad and comprehensive powers. It has wide administrative powers. It has legislative powers, such, for example, as the fixing of rates of public utilities, the exercise of which is prospective in operation and legislative in character. (*Southern Pac. Co. v. Railroad Com.*, 194 Cal. 734, 739 [231 P. 28].) That it also possesses judicial powers may not be questioned.

(*People v. Lang Transportation Co.*, 217 Cal. 166, 170 [17 P.2d 721].) When its determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings. (Pub. Util. Code, § 1709.) Direct attack is made available by application for writ of review to this court in accordance with the provisions of section 1756 of the Public Utilities Code. We are not herein dealing with a determination of the commission made in the exercise of its judicial power where no direct attack, on constitutional or other grounds, has been made within the time provided by section 1756. However, it seems clear that where those determinations have been appropriately and unsuccessfully challenged, as here, by direct attack and have run the gamut of approval by the highest courts, state and federal, they should have the conclusive effect of res judicata as to the issues involved where they are again brought into question in subsequent proceedings between the same parties. (*Sunshine A. Coal Co. v. Adkins,* 310 U.S. 381 [60 S.Ct. 907, 84 L.Ed. 1263].)

"Whether the order of the Supreme Court of the United States dismissing the appeal of the defendant "for want of a substantial federal question" is res judicata in that court on the question of alleged federal control of intrastate rates, is not for this court to decide. It is established, however, that the denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. (*Southern Calif. Edison Co. v. Railroad Com.*, 6 Cal.2d 737, 747 [59 P.2d 808].) This is so even though [630] the order of this court is without opinion. (*Napa Valley Elec. Co. v. Railroad Com.*, 251 U.S. 366 [40 S.Ct.

174, 64 L.Ed. 310].) In the last cited case it was held at pages 372 and 373 that a denial by this court of an application for a writ of review is "tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the State of California"; that the "absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company," and that it was a "final judicial determination" and "as effectual as an estoppel as would have been a formal judgment upon issues of fact." (See, also, *Funeral Dir. Assn. v. Board of Funeral Directors & Embalmers*, 22 Cal.2d 104, 107, 108 [136 P.2d 785]; *Southern Calif. Edison Co. v. Railroad Com., supra*, 6 Cal.2d 737, 747; *People v. Hadley*, 66 Cal.App. 370, 375 [226 P. 836]; *Southern Pac. Co. v. Van Hoosear*, 72 F.2d 903; *Consolidated Freightways, Inc. v. Railroad Com.* (1951), 36 F.Supp. 269, 270; *Adams v. Decoto* (1927), 21 F.2d 221.)

"The defendant relies on the case of *Stratton v. Railroad Commission*, 186 Cal. 119, which contains declarations that appear to be contrary to other and later decisions of the courts on the subject. It was said in that case at page 126 that "the commission is not a judicial tribunal in the strict sense." That statement is of course true. The commission is not a judicial tribunal constitutionally established as a part of the judicial department of the state. It is also observed that the commission is in the position of acting at times as informer, prosecutor, jury and judge in mat-

ters coming before it. This takes place, for example, when the commission on its own motion issues an order directing some person, firm or corporation within its regulatory jurisdiction to show cause why it should not be required to perform or not perform a certain designated act or be subject to discipline for performing an act contrary to law or public utility regulation. The proceeding may take on the character of an adversary proceeding in which the commission furnishes evidence, judicially passes upon the competence and weight of that evidence and makes an order based upon it. This kind of establishment was seriously criticized in its early stages by those affected by it. But it is the law that when the system has been duly authorized by the Constitution of the state and the procedure is such as to satisfy the requirements of due process, both state and federal, no valid objection can be made to it. Due process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made. (See *Southern Pac. Co. v. Public Utilities Com.* (1953), 41 Cal.2d 354, 365 [260 P.2d 70]. When the commission has acted and an interested party is dissatisfied due process is further afforded by the right of petition for a writ of review to this court. And of course no law of this state could deprive a party whose rights were prejudicially affected of the right to apply to the Supreme Court of the United States for relief on federal constitutional grounds."

Appendix G

Portion of the Opinion of the California Supreme Court in Consumers Lobby Against Monopolies v. Public Utilities Com., 25 Cal.3d 891 (1979), appearing at pages 899-905

"At the outset we address a contention that is often presented to us in response to a petition for writ of review, but nevertheless misapplies the authority on which it relies and ignores the realities of our rulings on such petitions. Both the commission and Pacific assert that we have previously decided the issue now before us—i.e., the commission's authority to award attorney fees and costs to public interest participants in its proceedings—and imply that we should follow those decisions under the doctrine of stare decisis. The decisions in question, however, are not embodied in published opinions of this court, but rather in minute orders in which we denied without opinion petitions for writs of review on two occasions several years ago. (*Citizens to Save Fallbrook's Environment v. Public Utilities Com.* (July 31, 1974) S.F. [899] 23067; *Toward Utility Rate Normalization v. Public Utilities Com.* (Oct. 17, 1976) S.F. 23395.) In support of their contention the commission and Pacific then quote the following language of *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 630-631 [268 P.2d 723]: "It is established . . . that the denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. [Citation.] This is so even though the order of this court is without opinion."

"The reliance is misplaced: *Western Air Lines* is not a stare decisis case but a res judicata case, and hence is governed by very different considerations. *Western Air Lines* arose because the commission decided in a proceeding before it that it had jurisdiction over the defendant's intrastate air route, and fixed the rates to be collected for such service; the defendant petitioned this court for writ of review; we denied the petition without opinion, and the United States Supreme Court dismissed the appeal for want of a federal question. The commission then filed a superior court action in the name of the People to recover statutory penalties from the defendant for its prior collection of unauthorized rates. (Pub. Util. Code, §§ 2104, 2107.) The action was dismissed on demurrer, and we reversed the judgment on the commission's appeal.

"Our opinion began by addressing the commission's contention that "the prior decision of the commission followed by the order of this court denying a writ of review and the dismissal of the defendant's appeal by the Supreme Court of the United States has resulted in res judicata as to certain issues involved in the present action," i.e., the commission's jurisdiction to regulate the defendant's intrastate fares. (42 Cal.2d at p. 629.) We recognized that the commission is empowered to make determinations of a judicial nature, and reasoned (at p. 630) that "where those determinations have been appropriately and unsuccessfully challenged, as here, by direct attack and have run the gamut of approval by the highest courts, state and federal, they should have the conclusive effect of res judicata as to the issues involved where they are again brought into question in subsequent proceedings between the same parties." Because the questions relating to the commission's jurisdic-

tion had been resolved in the prior proceeding and the parties in each were essentially the same, we held that the earlier determination was conclusive and "That conclusiveness arises by operation of law." (*Id.* at pp. 632-633.) [900].

"(1) Seen thus in context, the language now relied on by the commission and Pacific—i.e., that our denial of a petition for writ of review is "a decision on the merits both as to the law and the facts presented in the review proceedings"—was an integral part of our res judicata analysis. The sole means provided by law for judicial review of a commission decision is a petition to this court for writ of review (Pub. Util. Code, § 1756), which thereby serves in effect the office of an appeal. If our ruling on such a petition were not a final "decision on the merits both as to the law and the facts presented," the parties would be denied their right to such review. Because it must therefore be deemed a decision on the merits, our denial of such a petition raises the bar of res judicata against relitigation of the same cause of action between the same parties or their privies. (2) (See fn. 3.) This was the rule long before *Western Air Lines (Napa Valley Elec. Co. v. R. R. Comm.* (1920) 251 U.S. 366, 371-373 [64 L.Ed. 310, 313, 40 S.Ct. 174]), and it is still the rule today (see, e.g., *Pacific Tele. & Tel. Co. v. P. U. C. of State of Cal.* (9th Cir. 1979) 600 F.2d 1309)[3]

"The commision and Pacific do not urge that either of the prior cases they rely on bar the present litigation on the

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[3]This reasoning distinguishes the cases involving the prerogative writs such as prohibition and mandate. Because the law does provide other means of judicial review in such cases, appellate courts have discretion to summarily deny petitions for those writs

ground of res judicata; nor could they properly do so, for the causes of action here asserted—i.e., the particular claims of CLAM and TURN for attorney fees and costs in their respective proceedings before the commission—are not the same as those asserted in the prior cases. (3) One of the litigants now before us (TURN) was, however, a party to one of the prior decisions (S.F. 23395); as to such a party the prior decision may, in appropriate [901] circumstances, have the limited res judicata effect known as collateral estoppel. (See generally *Clark v. Lesher* (1956) 46 Cal.2d 874, 880-881 [299 P.2d 865], and cases cited.) It could therefore be contended that TURN is estopped to relitigate the issue of the commission's jurisdiction to award attorney fees and costs to the extent that such issue was actually decided in the earlier proceeding. But when

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on policy grounds unrelated to their procedural or substantive merits. It follows that an order denying such a petition without opinion is not res judicata. (See, e.g., *People v. Medina* (1972) 6 Cal.3d 484, 488-492 [99 Cal.Rptr. 630, 492 P.2d 686] [denial of petn. for writ of prohibition to review order refusing to suppress evidence]; *Hagan v. Superior Court* (1962) 57 Cal.2d 767, 770 [22 Cal.Rptr. 206, 371 P.2d 982] [denial of petn. for writ of mandate to review discovery order]; *Funeral Dir. Assn. v. Bd. of Funeral Dirs.* (1943) 22 Cal.2d 104 [136 P.2d 785] [denial of petn. for writ of mandate filed in first instance in Supreme Court]; see also *State Bd. of Equalization v. Superior Ct.* (1942) 20 Cal.2d 467, 470-471 [127 P.2d 4].) An exception has been recognized "when the sole possible ground of denial was on the merits or it affirmatively appears that the denial was intended to be on the merits." (*People v. Medina, supra,* at p. 491, fn. 6, of 6 Cal.3d.) And in any case in which the court issues an alternative writ and renders a written decision granting or denying relief, that decision has ordinary res judicata effect. (See, e.g., *Overstreet v. County of Butte* (1962) 57 Cal.2d 504, 506 [20 Cal.Rptr. 631, 370 P.2d 335] [prohibition]; *Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 733 [13 Cal.Rptr. 104, 361 P.2d 712] [mandate].)

the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 230 [123 Cal.Rptr. 1, 537 P.2d 1250]; *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749, 757-758 [22 Cal.Rptr. 14, 371 P.2d 758].) Both considerations are present in this case. If we were to decide that the commission has jurisdiction to award attorney fees and costs to public interest participants situated similarly to TURN, it would be unjust to deny the possibility of such compensation to TURN solely by reason of the doctrine of collateral estoppel. And because the sole *raison d'etre* of TURN and similar litigants is to represent the public interest, that same interest will evidently be promoted by a correct resolution of this significant question of law.

"(4) For different reasons we also conclude the prior cases invoked by the commission and Pacific should not be given stare decisis effect. The doctrine of stare decisis applies only to judicial precedents, i.e., to the ratio decidendi or actual ground of decision of a case cited as authority. (*Hart v. Burnett* (1860) 15 Cal. 530, 598-599.) It follows, of course, that a case is not authority for a point that was not actually decided by the court. (*Ibid.;* accord, *In re Tartar* (1959) 52 Cal.2d 250, 258 [339 P.2d 553], and cases cited.) The ratio decidendi of an appellate decision is ordinarily discovered by examining the opinion of the court. But we deal here, by definition, with cases in which this court rendered its decision without opinion, summarily denying petitions for writs of review. By relying on such cases as authority for points of law, the commission and Pacific

imply that our ratio decidendi in each instance was necessarily a ruling on the substantive grounds presented by the writ and answer. The code itself demonstrates this is not so.

"First, we are required to deny the entire petition on procedural grounds if certain prerequisites to our jurisdiction are not met. This will occur, for example, if prior to filing in this court the petitioner failed to apply to the commission for a rehearing (Pub. Util. Code, § 1731; compare Gov. Code, § 11523 [contrary rule under Administrative [902] Procedure Act]), or if the petitioner so applied but the application was denied by the commission on the ground that it was not timely filed (Pub. Util. Code, § 1731), or if the petitioner failed to apply to this court for a writ within the time specified by law (*Id.*, § 1756). In none of these instances, obviously, is our decision based on substantive grounds.

"Secondly, many if not most petitions for writ of review attack the action of the commission on multiple grounds. Yet the code prohibits the petitioner from relying on any ground that he did not set forth in his petition for rehearing before the commission. (*Id.*, § 1732.) If he persists in presenting such an issue to us in disregard of the statute, we are required to reject it for that reason alone. It follows that as to any such issue our denial of the petition is a decision on procedural grounds alone.

"Moreover, general principles of law governing judicial review of administrative proceedings may also require us to deny an entire petition for writ—or reject a particular ground thereof—without reaching its substantive issues.

Thus if the petitioner presents a question that he could have litigated before the commission but did not, we are barred from addressing it by the doctrine of exhaustion of administrative remedies. (See generally *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291-296 [109 P.2d 942, 132 A.L.R. 715].)

"The petition may come too late in another sense: when the issue raised by the petitioner is rendered moot by supervening events, the court will ordinarily deny the application for that reason. (See, e.g., *Cline v. Industrial Acc. Com.* (1931) 116 Cal.App. 439, 440 [2 P.2d 840].) It is true that in exceptional instances the court may nevertheless choose to address the issue if sufficient private rights (e.g., *Hall v. Scudder* (1946) 74 Cal.App.2d 433, 438 [168 P.2d 990]) or public interests (e.g., *Ballard v. Anderson* (1971) 4 Cal.3d 873, 876-877 [95 Cal.Rptr. 1, 484 P.2d 1345, 42 A.L.R.3d 1392]; *DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, 58 [13 Cal.Rptr. 663, 362 P.2d 487]) are at stake. It cannot do so, however, without taking the case; thus if it denies the petition without opinion when the issue is shown to be moot, it must be presumed to have acted on that ground.

"On the other hand, the petitioner may bring his case before us too soon. Although the code appears to permit the filing of a petition for rehearing and hence a petition for review after "any order or decision" of [903] the commission (Pub. Util. Code, §§ 1731, 1756), the commission frequently resists issuance of the writ on the ground the application is premature. It argues that the order or decision under attack is merely an interlocutory ruling—a step in a larger, ongoing proceeding not yet finally resolved by

the commission—and therefore is not ripe for judicial review. While the legal principle is settled (see, e.g., *Gumilla v. Industrial Acc. Com.* (1921) 187 Cal. 638, 639-640 [203 P. 397]), the question of when a commission action is sufficiently final for purposes of judicial review is often perplexing to the court. It is clear, however, that each time we deny all or part of a petition for lack of ripeness, we do not adjudicate its substantive issues.

"Finally, although standing to apply for judicial review in this court is accorded by the code to all parties to the proceedings before the commission and all person "pecuniarily interested" in the public utility in question (Pub. Util. Code, §§ 1731, 1756), we will deny the petition without reaching substantive issues when it appears that for any reason the applicant was not in fact aggrieved by the action of the commission. This result follows, for example, if the alleged harm is merely speculative (e.g., *E. Clemens Horst Co. v. Railroad Com.* (1917) 175 Cal. 660 [166 P. 804]), if the petition is in effect seeking declaratory relief (e.g., *C. A. Hooper & Co. v. Railroad Com.* (1917) 175 Cal. 811 [165 P. 689]), or if the petitioner is not a member of the class to which the principle contended for would apply.[4] [904]

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[4]This was the case, for example, in one of the prior denials of writs of review relied on herein by the commission and Pacific as stare decisis. (*Citizens to Save Fallbrook's Environment v. Public Utilities Com.* (July 31, 1974) S.F. 23067.) There the petitioner, a local public-interest group, sought to prevent commission approval of a utility's proposal to build an electric power transmission line across a scenic area. Initially the petitioner prevailed, and the commission issued a decision ordering the utility to adopt an alternate route proposed by the petitioner. The petitioner filed a motion for attorney fees. Thereafter, however, the commission reopened the

"In short, although a summary denial by this court of a petition for writ of review is "a decision on the merits" for res judicata purposes (*Western Air Lines*), it is not stare decisis. As we have seen, the merits of the decision may well be procedural rather than substantive; yet because there is no opinion, its ratio decidendi does not appear on its face. It would therefore be sheer speculation for litigants to rely on such decisions as precedents. In addition, such reliance may well prove a trap for the unwary: members of the public who have potentially meritorious petitions for review to present to this court may be dissuaded from doing so by the mere fact that we declined to take an earlier case allegedly raising the same question.

"For the foregoing reasons, the prior cases relied on herein by the commission and Pacific are neither binding nor persuasive on the issue now before us."

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case (Pub. Util. Code, § 1708), took additional evidence, and issued a new decision in which it approved the route originally proposed by the utility. The commission also denied the petitioner's request for attorney fees.

After denial of rehearing the petitioner applied to this court for a writ of review, attacking both the lawfulness of the second decision and the denial of attorney fees. On the latter point the petitioner contended it should be compensated for its efforts because it assertedly vindicated the public policy of preserving the environment and thus obtained a substantial benefit for the citizenry at large. The commission responded by defending its second decision and denying it had authority to award attorney fees. In ruling on the petition, however, we did not need to reach the latter issue: because we concluded that the second commission decision—approving the route proposed by the utility—was lawful, the petitioner ipso facto was not a prevailing party in the case. It had therefore conferred no benefit whatever on the public, and its request for attorney fees could be rejected without reaching the issue of the commission's authority to make such an award.